JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 1529

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, and LODGE 844 of the BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

Petitioners,

v.

GARY S. HANSEN, et, al., for himself and for and on behalf of 191 other persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

MULLINER, PRINCE & MANGUM

Robert M. Yeates
Denis R. Morrill

315 East Second South Street
Salt Lake City, Utah 84111

Counsel for Petitioners

May 1, 1970

INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
1. THE EVENTS UPON WHICH THE COMPLAINT IS PREDICATED OCCURRED IN THE COURSE OF A LABOR REPRESENTATION CONTEST THAT WAS SUBJECT TO THE NATIONAL LABOR RELATIONS ACT, AND THE LEGAL SIGNIFICANCE OF THOSE EVENTS MUST BE MEASURED BY THE FEDERAL ACT AND THE POLICIES THAT UNDERLIE THAT ACT	7
2. SECTION 501(a) OF THE LMRDA PROHIBITS AND PREVENTS COMPLIANCE BY PETITIONERS WITH THE JUDGMENT OF THE UTAH STATE DISTRICT COURT AFFIRMED BY THE SUPREME COURT OF THE STATE OF UTAH REQUIRING PAYMENT OF STRIKE BENEFITS WHERE THE UNION OFFICER EMPOWERED TO INTERPRET THE UNION CONSTITUTION HAS RULED THAT SUCH PAYMENT WOULD VIOLATE THE UNION CONSTITUTION	12
CONCLUSION	19
APPENDIX A	20
APPENDIX B	32

Page

APPENDIX C 37

APPENDIX D 41

Authorities

Cases:

Allen v. Southern Pacific Co., 166 Ore. 290, 110 P.2d 933 (1941) 18

Allen-Bradley Local 111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board & Allen-Bradley Co., 315 U.S. 740 (1942) 10

Amalgamated Clothing Workers of America v. Kiser, 174 Va. 229, 6 S.E.2d 562 (1939) 18

Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1947) 8

Boire v. Greyhound Corp., 376 U.S. 490 (1964) 9

Cleveland Orchestra Co. v. Cleveland Federation of Musicians, et al., 303 F.2d 229 (6th Cir. 1962) 18

Gonzales v. International Association of Machinists, 298 P.2d 92 (1956) 18

Highway Truckers & Helpers, Local 107 v. Cohen, 182 F. Supp. 608 (E. D. Pa. 1960) 16, 17

International Union, United Automobile, Aircraft & Agricultural Implement Workers of America v. Russell, 356 U.S. 634 (1958) 10

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) 11

LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18 (1948) 8

Linn v. United Plant Guard Workers of America, Local No. 114, 383 U.S. 53 (1966) 11

page

Local 100 of United Association of Journeymen and Apprentices v. Borden, 373 U.S. 690 (1963) 10

Local 174 Teamsters, Chauffers, Warehousemen & Helpers of America v. Lucas Flour, 369 U.S. 95 (1962) 10

NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956)..... 8

NLRB v. Teamsters, 314 F.2d 792 (1st Cir. 1963) 15

Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).... 8

Parks v. Atlanta Printing Pressmen, 243 F.2d 284 (5th Cir. 1957) 15

Pratt v. Amalgamated Association of Street & Railroad Employees, 50 Utah 472, 167 Pac. 830 (1917)..... 18

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 10

Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957) 10

United Brotherhood of Carpenters & Joiners of America v. Moore, 141 S.E.2d 729 (Va. S.C. App. 1965) 18

United Construction Workers, Affiliated with United Mine Workers of America, et al. v. Laburnum Const. Corp. 347 U.S. 656 (1954) 10

Weber v. Anhauser-Busch, Inc., 348 U.S. 468 (1955)..... 10

Statutes:

United States Code, Title 28, §1257 2

United States Code, Title 29

Section 152 8

Section 157 7

page

Section 158 15

Section 159 ..... 2, 3, 7, 15

Section 160 ..... 3, 9

Section 501 ..... 2, 3, 12, 14, 16, 18

Miscellaneous:

Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 95 (1964) 8

Thirty-Second Annual Report of the National Labor Relations Board, 18 9

IN THE

Supreme Court of the United States

October Term, 1969

No.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, and LODGE 844 of the BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

Petitioners,

v.

GARY S. HANSEN, et, al., for himself and for and on behalf of 191 other persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

The Petitioners, Brotherhood of Locomotive Firemen and Enginemen and Lodge 844 of the Brotherhood of Locomotive Firemen and Enginemen, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Utah entered in this proceeding on February 13, 1970.

OPINION BELOW

The opinion of the Utah Supreme Court, not yet reported and the findings of fact and conclusions of law and judgment rendered by the Third District Court for Salt Lake County are reproduced in the appendix hereto as Appendix "A" and Appendix "B" respectively.

JURISDICTION

The judgment of the Supreme Court of the State of Utah was entered on February 13, 1970. This Petition for Certiorari was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the Federal scheme for uniformity in the national labor policy requires state courts to yield jurisdiction over a dispute concerning a campaign promise to employees by a labor organization seeking to obtain collective-bargaining rights and certification pursuant to an NLRB election under 29 U.S.C. §159.

2. Whether section 501(a) of the LMRDA prohibits and prevents compliance by Petitioners with the judgment of the Utah State District Court affirmed by the Supreme Court of the State of Utah requiring payment of strike benefits where the union officer empowered to interpret the union Constitution has ruled that such payment would violate the union Constitution.

STATUTORY PROVISIONS

United States Code, Title 29:

§159: Representatives and Elections — Exclusive Representatives; Employees' Adjustment of Grievances Directly With Employer.

See Appendix "C".

United States Code, Title 29:

§160: Prevention of unfair labor practices — Powers of Board generally.

See Appendix "D".

United States Code, Title 29:

§501(a): The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder...

STATEMENT OF THE CASE

This dispute arose out of a National Labor Relations Board, herein referred to as "NLRB", election campaign wherein the Brotherhood of Locomotive Firemen and Enginemen, herein called "BLF&E", was seeking collective-bargaining rights of a group of employees at the Kennecott Copper mine. The employees in question were in a bargaining unit represented for purposes of collective bargaining by Local 485 of the Mine, Mill & Smelter Workers' Union, herein referred to as "Mine-Mill". The campaign began in the middle part of September, 1966, and ran through the 21st of June, 1967.

Commencing in September, 1966, through February or March, 1967, BLF&E organizers solicited membership from employees represented by Mine-Mill. Among the numerous benefits of the BLF&E which were advertised in the solicitation were the Constitutional provisions regarding strike benefit payments. Employees who joined during this time were promised strike benefits according to the BLF&E Constitution if they would join and vote for BLF&E representation.

Sometime in March, 1967, some of the BLF&E organizers involved in the campaign represented that strike benefits would be paid to those employees who joined the union regardless of the outcome of the NLRB election.

The BLF&E lost the NLRB election held on June 22, 1967. Subsequently, Mine-Mill was again certified as the bargaining representative of the unit which included the plaintiffs herein. The BLF&E has never, at any time, had such unit's bargaining rights.

On July 14 and 15, 1967, a strike was instituted at Kennecott Copper Corporation properties by all of the many unions involved. The BLF&E called the members in its bargaining unit on strike per authorization by its International President, Gilbert, at 12:01 P.M., July 15, 1967 (Exhibit P-138, R. 798).

On or about July 31, or August 1, 1967, the first BLF&E strike-benefit payroll was prepared by the local lodge and submitted to the Grand Lodge in Cleveland, Ohio. This payroll contained the names of the plaintiffs in this actian under erroneous job classifications expressly

contrary to a letter of instruction received by the Local Financial Secretary Martin Jensen from R. R. Bryant, General Secretary and Treasurer of the Grand Lodge, BLF&E (Exhibit D-191) and expressly contrary to the instructions on the payroll forms sent out by the BLF&E (Exhibit P-78). This payroll was rejected by President Gilbert and returned to the Local Lodge with the instructions that under the BLF&E Constitution only those members of the BLF&E in the bargaining unit represented for purposes of collective bargaining by the BLF&E and covered by the BLF&E labor agreement with Kennecott should be included on it.

Subsequently, a revised payroll was sent to the BLF&E in Cleveland, Ohio, which did not contain the names of the plaintiffs in this action. That payroll was paid. Plaintiffs in this action did not receive strike benefits from the BLF&E at any time during or after the strike.

President Gilbert informed Local Lodge 844 and the plaintiffs of his interpretation of the Constitution which forbade payment of strike benefits to employees not represented by the BLF&E. Gilbert's interpretation was based upon the previous rejection of suggested amendments to the pertinent sections of the BLF&E Constitution by the past International BLF&E Conventions, which amendments, if accepted, would have allowed payment to persons in the position of Respondents. (See Exhibit D-136 at p. 392.) (R. 785-787.)

This action was filed as a class action by the named individual on November 30, 1967, claiming principally a breach of contract. (See complaint, R. 1-19).

On April 30, 1968, by a Motion to Dismiss and a Motion for Summary Judgment (R. 195) defendants raised the questions presented in this petition. Defendants urged in that motion that the court lacked jurisdiction over the subject matter of the suit. That motion was supported by a Memorandum of Points and Authorities (R. 460-512) wherein the precise nature of the federal questions alleged was set forth with accompanying authorities. The preemption question was set forth and briefed completely in this Memorandum (R. 461-491). The question raised under Section 501 of the LRMDA was raised and also discussed fully in that Memorandum (R. 491-499). Both of these questions were again raised by oral motion at the end of plaintiffs' case and prior to the commencement of defendants' case at the trial. At that time, reference was made to the prior motion and the prior Memorandum of Points and Authorities filed and oral argument was made to the court (R. 1153). Both of these motions were denied by the court and the case proceeded to trial.

The Third District Court for Salt Lake County rendered judgment for Respondents in the aggregate sum of Two Hundred Twenty Thousand Two Hundred Seventy-Eight Dollars ($220,278.00). (R. 587.) Said court also concluded that its jurisdiction over the subject matter of the action was not preempted by any federal or other statute or regulation (R. 585).

Both of these questions were again raised on appeal to the Utah State Supreme Court as evidenced by the opinion of the court (Appendix "A") and the ceritification of the court (R. 1281-82).

REASONS FOR GRANTING THE WRIT

1. THE EVENTS UPON WHICH THE COMPLAINT IS PREDICATED OCCURRED IN THE COURSE OF A LABOR REPRESENTATION CONTEST THAT WAS SUBJECT TO THE NATIONAL LABOR RELATIONS ACT, AND THE LEGAL SIGNIFICANCE OF THOSE EVENTS MUST BE MEASURED BY THE FEDERAL ACT AND THE POLICIES THAT UNDERLIE THAT ACT.

In 1935 Congress resolved to establish a system of rules and policies to regulate labor relations between employers and employees engaged in or affecting interstate commerce pursuant to authority vested in Congress by the commerce clause of the Federal Constitution (Article I, Section 8). This plan of regulation emerged in the form of the National Labor Relations Act which, in a very real sense, divided the field of employer-employee relations into several principal areas or subjects of regulation.

Perhaps the most basic, and hence most important, of those areas or subjects of regulation is the definition of basic rights that employees shall have under the protection of the law. Those rights are, primarily, the right to self-organization without interference from any source, and the right to bargain collectively with employers through representatives chosen by the employees. This statement of employees' basic rights constitutes Section 7 of the Act (29 U.S.C. §157). To effectuate these basic rights, Congress vested the National Labor Relations Board with the duty and the authority to resolve questions concerning representation affecting interstate commerce. (29 U.S.C. §159). With reference to employers engaged in or affecting interstate commerce as defined in the National Labor Re-

lations Act (29 U.S.C. §152[6] and [7]), it is clear that the NLRB procedures for resolving questions concerning representation are exclusive.[1]

Fundamental to the existence of labor unions is the right of such unions to engage in organizational drives and activities. This right is guaranteed by the aforementioned federal statutes. Included in this right is the privilege to communicate with and to attempt to persuade employees to designate a union to be their collective-bargaining representative.[2] To insure relative success in this endeavor, unions have historically been given wide latitude in their campaign statements. Accordingly, representatives of unions, whether they are engaged in an NLRB election contest with an employer or are engaged in a competitive effort with another union to capture the support of the majority of the bargaining-unit employees, are notoriously lavish in the promises that they make and the boasting in which they indulge.

On the basis of the authority granted and the procedure prescribed by Sections 9 and 10 of the National Labor Relations Act, the conclusion is inescapable that Congress intended there should be a minimum of governmental regulation of the campaign tactics used by unions

---

[1] *LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18 (1948); *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767 (1947); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947).

[2] *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). *See* Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 95 (1964).

in connection with representation elections conducted pursuant to the National Labor Relations Act. Congress has therefore directed that such regulation as may be needed or be deemed appropriate is an administrative function and has vested authority over such action exclusively in the first instance in the NLRB. Such administrative action is then subject only to limited judicial review by the Federal courts of appeal under Section 10(f) (29 U.S.C. §160[f]) of the Act following unfair labor practice proceedings conducted by the Board pursuant to Section 10(a) of the Act. (29 U.S.C. §160[a]).[3]

During the 1967 fiscal year of the National Labor Relations Board, that agency conducted 7,822 collective-bargaining elections.[4] These elections could platform innumerable lawsuits premised upon promises and guarantees which the unions ultimately could not or did not fulfill. If unions are to be held accountable, under the common law of contracts, for the election promises made by their representatives in each of the fifty states wherein the elections take place, the inevitable result will be chaos and confusion due to the diversified limitations and restrictions which will be placed upon unions' organizational efforts.

Petitioners in this case are cognizant of the fact that the doctrine of preemption developed during the past twenty-five years whereby the NLRB has gained jurisdiction over substantially all phases of employer-employee

---

[3] *Boire v. Greyhound Corp.*, 376 U.S. 490 (1964).

[4] Thirty-second Annual Report of the National Labor Relations Board, 18.

relations involving basic rights of employees[5] does not directly answer the question of whether a state court may apply the substantive law of that state to contract actions based upon promises made in the context of an NLRB election campaign. Furthermore, a diligent search and examination of this court's applicable decisions by Petitioners has failed to disclose any criterion in this regard.[6] Accordingly, Petitioners respectfully submit that a direct and explicit answer to this question is critical to the orderly development of a national labor policy.

In addition, Petitioners believe that a basic incongruity exists between the interests of a state and the interests of the United States where a state is allowed to assume jurisdiction over an action such as the instant action. The interest of the United States is expressed in the administrative plan promulgated by Congress in Sections 9 and 10 of the National Labor Relations Act. Contrariwise, the interest of the state may well be to assure a recovery by its citizens regardless of any effect upon or-

---

[5] *Local 174 Teamsters, Chauffers, Warehousemen & Helpers of America v. Lucas Flour*, 369 U.S. 95 (1962); *Local 100 of United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690 (1963); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

[6] The exceptions to the preemption doctrine wherein state courts have been permitted to retain jurisdiction over matters which arguably could be within the province of the National Labor Relations Act are no determinative. See *International Union, United Automobile, Aircraft & Agricultural Implement Workers of America v. Russell*, 356 U.S. 634 (1958); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955); *United Construction Workers Affiliated with United Mine Workers of America, et al., v. Laburnum Const. Corp.*, 347 U.S. 656 (1954); *Allen-Bradley Local 111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board & Allen-Bradley Co.*, 315 U.S. 740 (1942).

ganizational rights of labor unions. If such contractual actions are allowed, it is certain that many similar or related suits will be filed in many or all of the fifty states of the United States. The potential for confusion is obvious. Ordinary concepts of state substantive contract law are no more applicable in this instance than they were with reference to a successor corporation's obligation to arbitrate a grievance arising prior to a merger. In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964) this court held a successor corporation was bound to arbitrate, state substantive contract law to the contrary notwithstanding.

If contractual actions such as that relied upon by Respondents are sustainable in the state courts, the organizational enthusiasm and freedom of discussion, persuasion and argument contemplated by the NLRB during an NLRB supervised representation election will be seriously threatened. The effect of allowing such a state contractual action will also very likely extend beyond the election campaign and seriously limit a union's freedom in negotiations with the employer. Rather than reach a settlement at a level less than it had earlier envisioned and promised to the employees during the election campaign, the union would be compelled to assume an adamant position and to force a strike if necessary in furtherance of its earlier commitment or assume the risk of a contractual damage suit.

Linn v. United Plant Guard Workers of America, Local No. 114, 383 U.S. 53, decided by this court in 1966, although somewhat paralleling the question posed in the instant case, is clearly distinguishable. In that case, an action based on the state law of libel was allowed to prevail. However, it does not appear from *Linn* that this court intended to

open the door for all possible state actions. There is nothing in that decision to imply a right to enforce contractual remedies arising out of an alleged electioneering offer by the representative of a union and an alleged acceptance by the employees.

Petitioners, for the reasons aforesaid, respectfully suggest that it is imperative that this court determine to what extent control over the legal consequences attaching to campaign promises by representatives of labor unions involved in NLRB supervised representation elections has been vested by Congress in the NLRB with judicial review being lodged in the United States' courts of appeal and the Supreme Court.

2. SECTION 501(a) OF THE LMRDA PROHIBITS AND PREVENTS COMPLIANCE BY PETITIONERS WITH THE JUDGMENT OF THE UTAH STATE DISTRICT COURT AFFIRMED BY THE SUPREME COURT OF THE STATE OF UTAH REQUIRING PAYMENT OF STRIKE BENEFITS WHERE THE UNION OFFICER EMPOWERED TO INTERPRET THE UNION CONSTITUTION HAS RULED THAT SUCH PAYMENT WOULD VIOLATE THE UNION CONSTITUTION.

Article 10 of the BLF&E Constitution concerning the payment of strike benefits provides:

> The rate of pay to each member and non-member engaging in a *legal strike authorized by this organization* shall be .... Article 10, Section 3, Exhibit 1). (Emphasis added.)

Article 16 of this Constitution vests in the International President the responsibility and authority to interpret the Constitution as follows:

ARTICLE 16
INTERPRETATION OF LAWS

Purpose and by Whom Interpreted

Sec. 1. (a) The provisions of this constitution shall be interpreted and construed according to their most plain and obvious meaning and to accomplish the purpose for which the Brotherhood was organized and is maintained.

(b) Should any doubt arise as to the proper construction of any Section or rule thereof, it shall be referred to the International President, whose decision shall be final, unless modified or reversed by the ensuing convention.

(c) All interpretations rendered by the International President on the Articles in the constitution, shall, unless rejected by the following convention, be incorporated in the constitution when codified. (Exhibit 1)

L. L. Iman, a field representative of the BLF&E, at one point in the election campaign stated that strike benefits would be paid to those who joined the BLF&E regardless of the outcome of the representation election. This was his interpretation of the BLF&E Constitution. Iman was not empowered to interpret the Constitution as that responsibility and right is vested solely in the International President pursuant to Article 16 of the Constitution. Thus, when the BLF&E lost the election and Mine-Mill was certified as Respondents' bargaining agent, President Gilbert refused to pay strike benefits to Respondents. In doing so, President Gilbert concluded that he was prohibited from paying the Respondents as Respondents were not "engaging in a legal strike authorized by this organization." President Gilbert concluded that he was constrained to make this interpretation in view of the refusal of the previous Constitutional Conventions to amend the Constitu-

tion so as to expand the payment of strike benefits to individuals in the same relative position as the Respondents (R. 785-787.) (Exhibit D-136.)[7]

Accordingly, President Gilbert determined that he could not pay these Respondents strike benefits under the BLF&E Constitution. (R. 783-787.) Acting in his fiduciary capacity, had he expended union funds in payment of strike benefits to the Respondents, Gilbert would have violated Section 501(a) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 501) which reads, in part, as follows:

> The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. *It is, therefore, the duty of each such person,* taking into account the special problems and functions of a labor organization, *to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in acordance with its constitution and bylaws* and any resolutions of the governing bodies adopted thereunder . . . .
> (Emphasis added.)

The expenditure ordered by the Utah courts violates this provision because the BLF&E's Constitution does not allow payment of strike benefits to persons in the position of Respondents. The words "legal strike *authorized*" by the BLF&E used in the BLF&E Constitution are words of art as used in the context of labor-management relations. The BLF&E could not authorize a strike of Respondents

---

[7]The initial strike payroll submitted to the Grand Lodge had printed instructions stating that an individual included "should appear on the payroll of the Lodge under whose jurisdiction he was employed when the strike began." (Exhibit P-78.)

here. If the BLF&E had attempted to call out the bargaining unit which included the Respondents and which was represented by Mine-Mill, the Petitioners would have been in violation of Section 8(b) (4) (ii) (C) (29 U.S.C. §158 [b] [4] [ii] [C]) of the National Labor Relations Act as amended.[8] That provision provides that it is an unfair labor practice to force or require:

> ... any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title ....

Section 9(a) of the Act (29 U.S.C. §159[a]) provides, in part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive representatives* of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. ... (Emphasis added.)

After the ceritfication election in June of 1967, the Mine, Mill and Smelter Workers' Union, not the BLF&E, was the exclusive representative of plaintiffs for the purposes of collective bargaining concerning the terms and conditions of employment, and thus was the only party that could authorize a strike of that unit. (R. 1224.) The economic strike authorization and call issued by the BLF&E on July 15, 1967, was for the purpose of achieving better terms and conditions of employment for *only* those person

---

[8] *See, Parks v. Atlanta Printing Pressmen*, 243 F.2d 284 (5th Cir. (1957); *NLRB v. Teamsters*, 314 F.2d 792 (1st Cir. 1963).

under the jurisdiction of the BLF&E. (Exhibit D-186; R. 1222-1224.)

The primary evil at which Section 501 is directed is manifestly the embezzlement and unlawful use of union funds by union officials. The literal language, however, and certainly one of the additional purposes for the statute is to forbid union officials from using or expending union funds in any manner that is "not in accordance with its constitution and bylaws."

That Section 501 constrains union officers from using union funds for purposes or in any manner not consistent with the union constitution is supported by the decision of the United States District Court in the case of *Highway Truckers & Helpers, Local* 107 *v. Cohen,* 182 F. Supp. 608 (E. D. Pa. 1960). The complaint in the *Cohen* case sought a preliminary injunction to prohibit the officers of Local 107 from using union funds to pay for the defense of certain union officers in criminal and civil actions brought against them in the courts of Pennsylvania. The principal question presented was whether the expenditure of union funds to pay legal fees to defend the officers of Local 107 was proper in light of the provisions contained in Section 501(a) of the Act, notwithstanding the fact that the expenditure was authorized by a resolution of the union membership passed at a regular union meeting.

The ultimate decision reached was that the expenditure authorized by the resolution was beyond the constitutional power of Local 107. Accordingly, the expenditure was deemed an improper use of union funds and hence, was a violation of Section 501(a) of the Act. The district court's de-

cision was affirmed by the court of appeals for the Third Circuit (284 F.2d 162) and this court denied certiorari (364 U.S. 833).

The BLF&E Constitution limited strike benefit payments "to each member and non-member engaging in a legal strike authorized by this organization." Benefits were not authorized to persons in the position of Respondents.

The BLF&E, as a non-profit association, holds its funds as the common property of all members. The Constitution of that association is the means by which the members protect their rights and interest in such funds and provide for expenditures to promote union purposes. This protection is particularly critical in the case of strike benefits inasmuch as inadequate union funds for such payments could result in assessments against the members individually.

During the NLRB election campaign at Kennecott, the Respondents were all provided with copies of the BLF&E Constitution or one was made available to them. (R. 1060-61.) Paragraph (e) of Article 10, Section 3 of that Constitution provides:

> The provisions of this Section concerning the payment of strike benefits are directory only, and shall not be the basis of any legal liability on the part of the Brotherhood. . . .

Union constitutions, when properly adopted, create a contractual relationship between the union and its mem-

bers.[9] Premised upon this limitation of union responsibility, state courts have previously denied the payment of strike benefits to individuals regardless of the representation or promise made by union officials.[10]

Petitioners contend that the prohibition set forth in Section 501 cannot be disregarded by a BLF&E officer or by any court. The Federal law, in Section 501(a), must be deemed controlling over all persons and all state authorities. For that reason, Petitioners respectfully submit that the state court cannot properly order the Petitioners to expend the BLF&E funds in payment of strike benefits to the Respondents, when the state court overrides the good-faith interpretation made by the association's International President in accordance with the union's constitutional procedures.[11]

The Petitioners respectfully urge that their petition be granted as Petitioners feel it is imperative that union constitutions with reference to the expenditure of union funds be controlled by Federal law and not be subject to diversified state interpretations. This can be demonstrated in the instant case if we assume, arguendo, that the Petitioners' NLRB election campaign had occurred simultan-

---

[9]*Cleveland Orchestra Co. v. Cleveland Federation of Musicians, et al.*, 303 F.2d 229 (6th Cir. 1962); *Gonzales v. International Association of Machinists*, 298 P.2d 92 (1956); *Allen v. Southern Pacific Co.*, 166 Ore. 290, 110 P.2d 933 (1941).

[10]*United Brotherhood of Carpenters & Joiners of America v. Moore*, 141 S.E. 2d 729 (Va. S.C. App. 1965); *Amalgamated Clothing Workers of America v. Kiser*, 174 Va. 229, 6 S.E. 2d 562 (1939).

[11]*See, Allen v. Southern Pacific Co.*, 110 P.2d 933 (Ore. 1941); *Pratt v. Amalgamated Association of Street & Railroad Employees*, 50 Utah 472, 167 Pac. 830 (1917).

eously in more than one state. In such circumstances, the Petitioners could have been faced with diametrically opposed interpretations as to their obligation for the payment of strike benefits.

These conflicts between state action and the Federal labor policy with reference to the expenditure of union funds justify the grant of certiorari to review the state court judgment.

CONCLUSION

The questions presented herein raise issues critical to the development and continuation of a sound, uniform Federal labor policy. Resolution of these questions will be of great value to employees, employers and unions alike in the area of industrial relations. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Utah.

Respectfully Submitted,

MULLINER, PRINCE & MANGUM

Robert M. Yeates
Denis R. Morrill

Counsel for Petitioners

Appendix A

**IN THE DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH**

GARY S. HANSEN, et al., for himself and on behalf of 191 other persons similarly situated,

Plaintiffs,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, and LODGE 844 of the BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Defendants.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Civil No. 176334

This case having been tried to the Court, argued, briefed and submitted for decision, the Court now makes and enters the following:

FINDINGS OF FACT

1. Plaintiffs are residents of Salt Lake County, State of Utah. At all material times, plaintiffs were employees of Kennecott Copper Corporation and members of both of the defendant unions. Attached hereto, designated Exhibit "A" and by this reference incorporated herein is a list of the persons that the Court finds to be proper plain-

tiffs in this action entitled to recovery in accordance with these Findings of Fact and Conclusions of Law, with the amount, exclusive of interest, to which each such plaintfif is entitled to recover set forth opposite each such plaintiff's name. As to all persons not named on said Exhibit "A", the Court finds generally that such persons are not entitled to recover in this action from defendants. As used hereinafter in these Findings of Fact and Conclusions of Law, the term "plaintiffs" refers to the persons named on Exhibit "A" hereto.

2. Defendant Brotherhood of Locomotive Firemen and Enginemen (hereinafter referred to as "BLF&E") is an unincorporated association which has its principal place of business in Cleveland, Ohio, and which, at all material times, transacted business in the State of Utah and within Salt Lake County.

3. Defendant Lodge 844 of defendant BLF&E is an unincorporated association and a subordinate lodge of said defendant BLF&E. Its members are residents of the State of Utah who do business under the aforementioned name. Said defendant lodge maintains its principal place of business in Salt Lake County, State of Utah, and has, at all material times, transacted business in the State of Utah and within Salt Lake County.

4. In or about September 1966, defendants initiated an organizational campaign among employees of Kennecott Copper Corporation ("Kennecott"), intended and designed to attract plaintiffs and other employers of Kennecott into membership in said defendant unions.

5. As part of this organizational campaign, defendants, through various of their officers, including BLF&E international officers, general organizers and other authorized representatives, repeatedly represented, promised and guaranteed to plaintiffs, both orally and in writing, that plaintiffs would receive strike benefits, varying from $90.00 to $150.00 per month per man (according to the number of his dependents) in the event they joined defendants and a strike occurred at Kennecott.

6. During at least the final three months of this organizational campaign, authorized representatives of defendants represented to plantiiffs that they would be paid said strike benefits regardless of the outcome of the then forthcoming representation election, held June 20-21, 1967; at no time during said campaign did defendants or any of their said authorized representatives condition the payment of said strike benefits upon BLF&E success in said representation campaign or election or upon any factor other than plaintiffs' membership in defendants.

7. Plaintiffs, induced by and in reliance upon these and other offers, representations and guarantees, and particularly those regarding strike benefits, accepted said offers, joined as members of defendants and thereafter performed all obligations and duties required of members, including payment of dues, attendance at meetings and service of picket duty.

8. A valid and enforceable contract was thereby entered into between plaintiffs and defendants for the payment to plaintiffs of strike benefits pursuant to an agreed schedule, in the event of a strike at Kennecott.

9. Said schedules, as set forth in the Constitution of defendant BLF&E, as represented and offered to plaintiffs by defendants orally, and as represented to plaintiffs by defendants in writing, is as contained in one of defendants' flyers used and distributed in said organizational campaign, a copy of which is attached hereto, marked Exhibit "B" and by this reference incorporated herein.

10. From July 15, 1967, to March 29, 1968, plaintiffs, among other Kennecott employees, engaged in a strike at the Kennecott properties in Utah, which strike was authorized and engaged in by defendants and other unions at Kennecott.

11. Immediately after the commencement of the strike at Kennecott on or about July 15, 1967, by defendants and the other unions representing employees at Kennecott, plaintiffs reported to defendants' strike headquarters and signed for and served picket duty for defendants and informed the local lodge financial secretary of the number of their dependents for the purpose of receiving strike benefits from defendants.

12. Shortly thereafter, and toward the end of July, 1967, plaintiffs were included, among all members of defendant Lodge 844, on a duly certified and authorized strike payroll submitted by the officers of defendant Lodge 844 to defendant BLF&E for the payment of promised strike benefits. Said strike payroll was prepared by the defendant Lodge 844, certified by the proper officer of defendant BLF&E and properly presented to defendant BLF&E. Plaintiffs were stricken from this strike payroll by H. E. Gilbert, President of defendant BLF&E, and were refused

any and all promised strike benefits whatever from defendants. Under the Constitution of defendants, said strike payroll was valid and binding, and the said H. E. Gilbert had no right or authority to delete plaintiffs' names therefrom.

13. None of plaintiffs has been paid any strike benfeits whatever from the defendants in connection with the aforementioned strike at Kennecott.

14. As a result of the failure and refusal of the defendants to pay promised strike benefits to plaintiffs during the pendency of said strike at Kennecott, many of plaintiffs were compelled, in order ot support themselves and their families, to seek outside employment during said period.

15. Plaintiffs were, at all times pertinent, members in good standing of defendant unions and are entitled to all rights and benefits of membership in such unions.

16. Defendants, throughout the above-mentioned strike period, paid full strike benefits to all qualifying members of Lodge 844, other than plaintiffs, including members outside the bargaining unit represented by the BLF&E.

17. At no time did defendants disqualify any member (including any of plaintiffs) from receiving such strike benefits because of any outside earnings during the strike peroid; nor did defendants make any inquiry concerning the outside earnings of those members receiving strike benefits during the said strike.

18. Defendants offered no evidence tending however indirectly to establish that any of plaintiffs were not entitled to the full amount of strike benefits strictly in accordance with Exhibit "B" hereto for the full period of the aforesaid strike, and plaintiffs and each of them are entitled to such benefits for such period.

19. Defendants and their officers occupy a position of trust and confidence both with respect to plaintiffs as members of said unions and with respect to the strike funds involved herein, which are accumulated from the general dues of defendants' members including plaintiffs. In such a position of trust, defendant unions and their officers and agents have and at all material times have had a strict fiduciary duty fairly to administer this member-created fund without discrimination among said members and to pay to plaintiffs said strike benefits.

20. During the organizational campaign described herein, various officers and agents of defendant BLF&E knew that plaintiffs were being promised the strike benefits described herein, and knew that said benefits were being expressly promised without regard to the outcome of the June 20-21, 1967, representation election, and knew that defendants would not pay, and never intended to pay such benefits to plaintiffs unless defendants were successful in said election. Such conduct was in violation of the fiduciary duty owed by defendant BLF&E and its officers to plaintiffs and other members of said defendant, and said defendant and its participating officers were in bad faith in such conduct. Said conduct was a wrongful, willful and malicious breach of said fiduciary duty.

21. By reason of defendant unions' refusal to pay to plaintiffs the strike funds involved herein, plaintiffs have been damaged in the aggregate amount of $220,278.00 and are entitled to interest thereon plus costs. Said damage amount is in accordance with the schedule of strike benefits used by defendants in their organization campaign and included in the BLF&E constitution, and is awarded to plaintiffs severally in accordance with Exhibit "B" hereto.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the persons and entities, including defendant unions, that are parties to this action, and over the subject matter of this action.

2. The jurisdiction of this Court over the subject matter of this action is not pre-empted by any federal or other statute or regulation.

3. Defendants' claims that this Court has no power to interpret or apply the provisions of defendants' constitution and that plaintiffs' claims are precluded by failure to exhaust internal union remedies are without merit and do not constitute defenses to plaintiffs' claims.

4. Duly qualified agents of defendants entered into valid and binding contracts with plaintiffs, and each of them, obligating defendants to pay to plaintiffs strike benefits in the amounts set forth in defendants' constitution and Exhibit "B" hereto in the event of a strike at Kennecott Copper Corporation, including the strike that occurred at Kennecott Copper Corporation commencing July 15, 1967.

5. The aforesaid acts of defendants' agents were authorized expressly and by implication, and were subsequently ratified, by defendants, and were and are fully binding on defendants, and each of them.

6. During the period from July 15, 1967, through March 29, 1968, plaintiffs, and each of them, all of whom were at said times members of defendants in good standing, participated in a legal strike authorized by defendants at the properties of Kennecott Copper Corporation in Salt Lake County, Utah.

7. Defendants breached their contract, hereinabove described, with plaintiffs by failing and refusing to pay to plaintiffs strike benefits as required by the terms of said contract.

8. By reason of said breach of contract, plaintiffs have been damaged in the aggregate sum of $220,278.00, representing the aggregate benefits to which plaintiffs are entitled severally under the express terms of said contract.

9. The officers, agents and employees of defendants who performed acts material to the consummation and breach of the aforesaid contract, and defendants themselves, occupied at all material times positions of trust and confidence in relation to plaintiffs' relevant affairs. Said persons, and defendants, breached the fiduciary duties owed to plaintiffs. Plaintiffs have suffered consequential damages as a direct and proximate result of defendants' said breach of fiduciary duty in the aggregate sum of $220,278.00.

10. In addition to the aforesaid sums, plaintiffs are entitled to recover from defendants interest at the rate of six percent (6%) per annum on the contract and consequential damages from and after the date upon which each payment was owing under the contract to the date of judgment herein (in the amount of $19,562.75 through May 19, 1969) and costs taxed in accordance with the practice of this Court.

11. Plaintiffs are entitled to judgment in their favor and against defendants, jointly and severally, in accordance with these conclusions of law.

ENTERED at Salt Lake City, Utah, this 21st day of May, 1969.

BY THE COURT:
s/Leonard W. Elton
Leonard W. Elton
District Judge

ADDITIONAL FINDING OF FACT

[caption omitted]

This case having been tried to the Court, argued, briefed and submitted for decision; and the Court having previously entered findings of fact and conclusions of law, now makes and enters the following additional

FINDING OF FACT

Defendants presented evidence relating to the earnings of the plaintiffs from outside sources during the time of the strike by way of interrogatory answers which were admitted in evidence by agreement of the parties before the Court in chambers. The Court finds that said interrogatory answers were properly admitted and are a part of the record of this case. Finding of Fact number 18 previously entered, to the extent inconsistent with this finding, is void and ineffectual.

ENTERED at Salt Lake City, Utah, this 2nd day of June, 1969.

BY THE COURT:
Leonard W. Elton
District Judge

ADDITIONAL CONCLUSION OF LAW

[caption omitted]

This case having been tried to the Court, argued and briefed, and submitted for decision; and the Court having previously entered Findings of Fact and Conclusions of Law, and an additional Finding of Fact, the Court now makes and enters the following additional

CONCLUSION OF LAW

Defendants have waived and abandoned the right, if any, under their Constitution to terminate the payment of strike benefits (to plaintiffs and other striking members of defendants during the strike described in the Findings of Fact entered herein) upon the ground that persons otherwise entitled to strike benefits earned in excess of $150.00 per month during said strike. In addition, defendants are estopped by their conduct relative to plaintiffs, by their representations and assurances to plaintiffs that the said claimed $150.00 per month outside earnings limitation had never been invoked and would never be invoked, and by their refusal to pay strike benefits to plaintiffs to which plaintiffs were entitled, resulting in economic hardship compelling plaintiffs to obtain outside employment, to refuse the payment of strike benefits to plaintiffs upon the ground that any plaintiff earned more than $150.00 per month during said strike.

DATED this 2nd day of June, 1969.

BY THE COURT:

Leonard W. Elton
District Judge

JUDGMENT

[caption omitted]

The above-entitled action came on for trial before the above-entitled Court sitting without a jury, with the Honorable Leonard W. Elton, District Judge, presiding, and the issues having been duly tried and the Court having entered and filed its Findings of Fact and Conclusions of Law, and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs have and recover from defendants, jointly and severally, damages in the aggregate sum of $220,278.00, divided among plaintiffs severally in accordance with Exhibit "A" attached hereto and by this reference incorporated herein, together with interest on said sums in accordance with law in the aggregate amount of $19,562.75, for damage resulting from defendants' breach of contract and breach of fiduciary duties owed plaintiffs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs have and recover from defendants, jointly and severally, their costs incurred herein, to be taxed in accordance with the practice of this Court.

ENTERED this 21st day of May, 1969.

BY THE COURT:
Leonard W. Elton
District Judge

Appendix B

IN THE SUPREME COURT OF THE STATE OF UTAH

GARY S. HANSEN, et al., for himself and for and on behalf of 191 other persons similarly situated,

Plaintiffs and Respondents,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, and LODGE 844 OF BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Defendants and Appellants.

No. 11726

FILED FEBRUARY 13, 1970

L. M. Cummings, Clerk

TUCKETT, Justice:

In this action the plaintiff Gary S. Hansen and the other plaintiffs who were employees of Kennecott Copper Corporation seek to recover strike benefits which accrued to the plaintiffs during the 1967-1968 strike at Kennecott. These proceedings were commenced as a spurious class action[1] pursuant to Rule 23(a) (3), Utah Rules of Civil Procedure.

The case was tried in the court below without a jury and judgment was entered in favor of the plaintiffs. From the judgment the defendants have appealed to this court.

---

[1]Salt Lake City v. Utah Lake Farmers Ass'n., 4 Utah 2d 14, 286 P.2d 773.

In the fall of 1966, the defendants commenced a campaign among the employees of Kennecott seeking to increase the membership of the defendant unions. The Brotherhood of Locomotive Firemen and Enginemen is the international union which is referred to as the Grand Lodge. Lodge 844 of Brotherhood of Locomotive Firemen and Enginemen is the local union at Kennecott. The Grand Lodge has its headquarters at Cleveland, Ohio, and has some general supervisory powers over the local unions.

The defendant unions embarked on the program of increasing their membership among the employees of Kennecott to the end that the local lodge would become the bargaining representative of Kennecott and replace the Mine, Mill and Smelter Workers Union as representative at the mine. In carrying out the organizational campaign, the Grand Lodge sent general organizers and other representatives to the area to assist in the program of recruiting new members in the defendant unions. During the campaign the defendants, through their organizers and representatives, offered to pay to new members strike benefits ranging from $90 to $150 pre month depending upon the number of the member's dependents. In addition to the oral representations and offers the defendants also circulated fliers among the employees of Kennecott which stated in effect that the defendants would guarantee strike benefits to employees who joined the union regardless of whether or not the defendant union succeeded in winning the election to determine which union became the bargaining representative at the mine.

During the period from July 15, 1967, to March 29, 1968, the employees of Kennecott, including the plaintiffs,

were on strike. During the course of the strike the plaintiffs continued to pay union dues, attending the meetings of the union, and served on picket lines.

A short time aftre the commencement of the strike, a strike payroll was prepared by the officers of the local union which included the names of the plaintiffs and which was forwarded to the Grand Lodge. After the payroll was received by the Grand Lodge the president struck from the payroll the names of the plaintiffs. The names of other members of the union who had joined the lodge prior to the 1966-67 organizational campaign were included on the payroll and were paid strike benefits, but the defendants refused to pay the plaintiffs. The court found that the defendant unions had not disqualified any of the plaintiffs from receiving strike benefits by reason of said plaintiffs receiving other earnings during the course of the strike; and that the defendants had offered no evidence to show that the plaintiffs were not entitled to the full amount of the strike benefits claimed by them. The trial court also found that the officers of the defendant unions occupied a position of trust and confidence in respect to union dues collected from the membres and had to pay out and to administer those funds without discrimination.

The trial court concluded that the defendant unions through their authorized representatives had made offers to the plaintiffs to pay strike benefits should the plaintiffs become members of the unions. The court also concluded that the plaintiffs by becoming members of the unions accepted the offers to the end that a binding contract was formulated between each of the plaintiffs and the defendants. The defendants breached the contracts entered into and the plaintiffs are entitled to recover damages resulting

from said breaches. The trial court having entered judgment in accordance with its findings and conclusions, the defendants appealed to this court claiming that the trial court committed numerous errors.

The defendants' first contention is that findings of fact are not supported by the evidence. We are of the opinion that the evidence does support the court's finding that the plaintiffs and the defendants entered into a contractual relationship which obligated the defendants to pay strike benefits. The evidence also supports the finding that the defendants through their duly elected officers authorized the strike which was called at Kennecott.

Secondly, the defendants contend that any representation by its organizers to pay strike benefits was ultra vires the union constitution. The trial court found on the evidence that the contracts entered into with the plaintiffs were within he provisions of the union constitution, and we found no error in the court's interpretation of that evidence. In this connection it should be noted that the defendants did in fact pay strike benefits to members of the union but that the names of the plaintiffs were stricken from the strike payroll even though the plaintiffs were members in good standing at the time.

Thirdly, it is the defendants' contention that all of the members of the Labor Union are bound by the constitution of that organization, and that the interpretation of its provisions by the president of the union is binding on the members and also on the court. We are in accord with the notion that the members of the Labor Union are entitled to interpret the provisions of the constitution the members

have adopted, but we do not agree that a union is entitled to so interpret the provisions of its constitution so as to avoid contractual obligations entered into by it.

Fourthly, the defendants contend that it was error for the plaintiffs to circularize potential plaintiffs to join in this action against the defendants. The record indicates that this procedure was authorized by the court and that it comes within the provisions of Rule 23, Utah Rules of Civil Procedure. The action taken would tend to avoid a multitude of separate actions.

Fifthly, it is contended by the defendants that the courts of the State of Utah do not have jurisdiction of the subject matter of this action as the field has been pre-empted by federal authority under the provisions of the National Labor Relations Act. This being a controversy between labor unions and members of those unions we do not consider that the case comes within the pre-emption doctrine.[2]

The defendants raise other points on appeal which we deem it unnecessary to discuss separately. Our review of the record does not reveal errors of sufficient gravity to justify a reversal. The decision of the court below is affirmed. Plaintiffs are entitled to costs.

WE CONCUR:

J. Allan Crockett, Chief Justice
E. R. Callister, Jr., Justice
F. Henri Henriod, Justice
A. H. Ellett, Justice

---

[2]Marshall v. International Longshoremen's and Warehousemen's Union, 22 Cal. Rptr. 211, 371 P.2d 987; Linn v. United Plant Guard Workers, 383 U.S. 53, 86 Sup.Ct. 657.

Appendix C

§ 159. Representatives and elections — Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievenaces to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

Determination of bargaining unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been establish-

ed by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

Hearings on questions affecting commerce; rules and regulations

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

Petition for enforcement or review; transcript

(d) Whenever an order of the Board made pursuant to sectoin 160 (e) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Secret ballot; limitation of elections

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a) (3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

Appendix D

§ 160. Prevention of unfair labor practices — Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency or any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice,

the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the preson aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Reduction of testimony to writing; findings and orders of Board

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an

order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Modification of findings or orders prior to filing record in court

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for

appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of

the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Review of final order of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Institution of court proceedings as stay of Board's order

(g) The comencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

Jurisdiction of courts unaffected by limitations prescribed in sections 101-115 of this title

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101-115 of this title.

Expeditious hearings on petitions

(i) Petitions filed under this subchapter shall be heard expeditiously, and if possible within ten days after they have been docketed.

Injunctions

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Hearings on jurisdictional strikes

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with

respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further,* That such officer or regional attorney shall not apply for any restraining order under section 158(b) (7) of this title if a charge against the employer under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title.

Priority of cases

(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a) (3) or (b) (2) of section 158 of this title, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l) of this section.